

A majority of the Board awarded benefits to a school cross country coach, who worked for the employer from September - November and was promised the same position for the following fall. He was not disqualified under G.L. c. 151A, sec. 28A, because he did not have reasonable assurance of reappointment during successive academic terms.



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THE COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF LABOR AND WORKFORCE DEVELOPMENT
BOARD OF REVIEW

Board of Review Letterhead

**BOARD OF REVIEW
DECISION**

JOHN A. KING, Esq.
CHAIRMAN

SANDOR J. ZAPOLIN
MEMBER

STEPHEN M. LINSKY Esq.
MEMBER

Introduction and Procedural History of this Appeal

The claimant appeals a decision by a review examiner of the Division of Unemployment Assistance (DUA), to deny unemployment benefits. We review, pursuant to our authority, under G.L. c. 151A, § 41. We affirm in part and reverse in part.

The claimant separated from his position with the employer during the week ending November 14, 2009. He re-opened a prior claim for benefits with the DUA, which was allowed in a determination issued on April 2, 2010. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits attended only by the employer, the review examiner, in a decision rendered on June 2, 2010, overturned the agency's initial determination and denied benefits beginning the week ending December 5, 2009. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant had reasonable assurance of re-employment in the same position for the employer and, thus, was disqualified under G.L. c. 151A, § 28A(a). After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal, we remanded the case to the review examiner to obtain additional evidence about the claimant's employment and contract with the employer. Only the claimant attended the remand hearing. Thereafter, the review examiner issued her consolidated findings of fact. Our decision is based upon our review of the entire record.

The issue on appeal is whether the claimant, who worked as an athletic coach at the employer's high school from September 8, 2009 until November 14, 2009, and received reasonable assurance of reemployment in the same capacity during the following September is, nonetheless, entitled to benefits during the intervening months, because he was not offered reasonable assurance of reemployment during the *next* academic term.

Findings of Fact

The review examiner's consolidated findings of fact and credibility assessments are set forth below in their entirety:

1. The claimant began work for this employer as a "Cross Country Coach" for the instant employer, an educational institution, on April 24, 2005. The claimant worked a part-time schedule of hours.
2. The "Procedure/Process" policy states, "... At the time of the evaluation conference the coach will indicated his/her intention to return for the next season. The Athletic Director will indicate within 7 days of the post evaluation conference whether the coach will be recommended for renewal."
3. The Athletic Director makes a recommendation but the Superintendent of Schools makes the decision on whether a position will be offered for the next season.
4. In 2009, the claimant began work for the employer on September 8, 2009.
5. The claimant last performed services for the employer during the week ending November 14, 2009.
6. On December 1, 2009, the Director of Athletics gave the claimant an "Evaluation of Coaches" ("the Evaluation"). The last item on the Evaluation states, "At this time does the coach intends [sic] to return for the next season?" The claimant answered he was available for the next season. The Evaluation further states, "The Athletic Director will indicate within 7 calendar days whether the coach will be recommended for removal following the coach's evaluation." The Evaluation was signed by the claimant and dated December 1, 2009.
7. The claimant did not perform any other work for the employer during the 2009-2010 academic year.
8. At the end of the 2009-2010 academic year, the claimant was not informed that a position was available for the next academic year.

9. The claimant re-opened a claim for unemployment benefits on November 13, 2009. The effective date of the re-opened claim was established to be November 14, 2009. The claimant's unemployment benefit amount was established to be \$298.

10. On April 2, 2010, a "Notice of Determination on Eligibility under Section 28A" ("the Notice") was issued by the Division of Unemployment Assistance ("DUA"). The Notice stated, "...It has been established that the claimant, although having performed services during the most recent academic year, does not have a contract or reasonable assurance to perform such services for the next academic year. Therefore, the claimant is eligible for benefits on the basis of [her] [sic] service in employment..."

11. In September 2010, the claimant received official notification that he was going to be offered a position for the 2010-2011 academic year.

Ruling of the Board

The Board adopts the review examiner's consolidated findings of fact. In so doing, we deem them to be supported by substantial and credible evidence. However, we reach our own conclusions of law, as are discussed below.

The review examiner denied benefits under G.L. c. 151A, § 28A, which provides, in relevant part, as follows:

Benefits based on service in employment as defined in subsections (a) and (d) of section four A shall be payable in the same amount, on the same terms and subject to the same conditions as benefits payable on the basis of other service subject to this chapter, except that:

(a) with respect to service performed in an instructional,...capacity for an educational institution, benefits shall not be paid on the basis of such services for any week commencing during the period *between two successive academic years or terms*, or when an agreement provides instead for a similar period between two regular but not successive terms,...to any individual if such individual performs such services in the first of such academic years or terms and if there is a contract or a reasonable assurance that such individual *will perform services* in any such capacity for any educational institution *in the second of such academic years or terms*;...(emphasis added.)

The review examiner disqualified the claimant because she concluded that the claimant had reasonable assurance of reappointment to the same position during the next academic year. The claimant received notice in December, 2009 that the athletic director was recommending him for

reappointment in the fall, 2010 semester. The evidence in the record indicates that the claimant had been reappointed to work as the employer's cross country coach in each of the two previous years,¹ and that the claimant had been given notice of his probable continuation in the same manner in past years. We conclude that, given this past history of reappointment based upon the athletic director's recommendation, this notice of recommendation constituted reasonable assurance of reappointment, within the meaning of G.L. c. 151A, § 28A. However, while the claimant had reasonable assurance of being reemployed as the cross country coach, it was not assurance of reemployment in the *next* academic term. As such, we conclude that the claimant's notice of probable reappointment did not meet the temporal requirement of G.L. c. 151A, § 28A, and that he, therefore, cannot be disqualified on the basis of it.

The explicit language of G.L. c. 151A, § 28A(a), denies benefits only during vacation periods and between two *successive* academic terms, and denies between terms only when the employees are working (or have a reasonable expectation of working) both before *and immediately after* these breaks or terms. Here, in order to be disqualified, under G.L. c. 151A, § 28A(a), the claimant would have had to receive reasonable assurance of being rehired in the next successive academic term, which is to say the spring 2010 term.

We believe that G.L. c. 151A, § 28A(c), makes clear that the Legislature intended to withhold benefits to school employees during holiday and vacation periods only when they worked immediately before and after such recesses. This aspect of G.L. c. 151A, § 28A, is set forth more clearly under G.L. c. 151A, § 28A(c), which provides as follows:

[W]ith respect to services described in subsections (a) and (b), benefits shall not be paid to any individual on the basis of such services for any week commencing during an established and customary vacation period or holiday recess if such individual performs such services in the period immediately before such vacation period or holiday recess, and there is a reasonable assurance that such individual will perform such services in the period immediately following such vacation period or holiday recess;

We note that the interpretation of the temporal element of G.L. c. 151A § 28A's "between terms" language which we articulate today is in accord with that of the one appellate court decision that we are aware of which has construed the substantially identical language of the "between terms" benefit denial provision of another state's unemployment insurance statute. Thus, the Pennsylvania Commonwealth Court, in Katz v. Commonwealth of Pennsylvania Unemployment Compensation Board of Review, 540 A.2d 624, 626 (1988), held that claimants employed during the winter semester and assured of rehire in the following fall semester but not in the immediately upcoming spring semester were entitled to benefits, because the spring semester was not a period between academic terms.

We, therefore, conclude as a matter of law that the claimant is not disqualified, under G.L. c. 151A, § 28A(a), because he did not have reasonable assurance of reappointment during the successive academic term².

The portion of the review examiner's decision that awarded benefits for the weeks ending November 14, 2009 through November 28, 2009, is affirmed. The portion of the review examiner's decision which denied benefits beginning the week ending December 5, 2009, until the beginning of the next academic year is reversed. The claimant is entitled to receive benefits for the week ending November 14, 2009, and for subsequent weeks, if otherwise eligible.

BOSTON, MASSACHUSETTS

DATE OF MAILING - October 13, 2011

/s/

John A. King, Esq.
Chairman

/s/

Stephen M. Linsky, Esq.
Member

/s/

Member Sandor J. Zapolin declines to sign the majority opinion.

ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS DISTRICT COURT
(See Section 42, Chapter 151A, General Laws Enclosed)

LAST DAY TO FILE AN APPEAL IN COURT – October 13, 2011

AB/rh

¹ Remand Exhibit #5 provides that the claimant had been hired as the employer's cross country coach each fall since 2007. While not explicitly incorporated into the review examiner's findings, the employer's statement is part of the unchallenged evidence introduced at the hearing and placed in the record, and it is thus properly referred to in our decision today. See Bleich v. Maimonides School, 447 Mass. 38, 40 (2006); Allen of Michigan, Inc. v. Deputy Dir. of Department of Employment and Training, 64 Mass. App. Ct. 370, 371 (2005).

² We note that the claimant's appeal has also raised an unrelated issue of the extension of his benefit year, seeking to be able to continue receiving federal EUC benefits rather than being forced to open a new state UI claim. This change is one which we have no authority to make. See Section 202(a)(1) of the Federal-State Extended Unemployment Compensation Act of 1970, as amended, appearing in 26 U.S.C. § 3304(a)(11).